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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ARLIE GLEN SKELTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether GM, with no economic stake in the attorneys' fee issue it seeks to raise, has standing to petition for certiorari.

Whether review by this Court of an attorneys' fee award of a 1.6 risk multiple out of a common fund is warranted when there is no conflict among the Circuits and the Seventh Circuit's decision is consistent with the decisions of this Court.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 860 F.2d 250 (1988).

JURISDICTION

On June 1, 1989, the Clerk of the Supreme Court extended the time for filing a brief in opposition to the petition for a writ of certiorari to and including July 14, 1989. GM attempts to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) (1982). However, this case is not properly before this Court because GM lacks standing to bring its petition for a writ of certiorari.

STATEMENT OF THE CASE

Beginning in 1976 and continuing through 1979, General Motors Corporation ("GM") equipped large numbers of its automobiles with defective THM 200 transmissions. These transmissions failed at an alarming rate—some models expe-

rienced failure rates in excess of 40%. In 1979, the underlying litigation was brought as a class action alleging a wide range of claims including violations of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1982) ("Magnuson-Moss" or the "Act"), various state consumer protection statutes and common law claims. Plaintiffs sought damages for a class of consumers who purchased GM automobiles with defective THM 200 transmissions and suffered actual monetary losses from transmission breakdowns. After six years of extensive discovery, after a national class of injured consumers was certified, after GM's numerous motions to dismiss were denied and when the litigation was headed toward a trial date, GM settled its liability to the plaintiff class by creating a settlement fund of $19.5 million ($17 million cash plus a reserve cash fund of $2.5 million). GM further agreed to bear the costs of two individual first class notices mailed to over three million potential class members. The total value of the settlement, including the costs borne by GM, was in excess of $21 million. The background of the litigation is described more fully in the decisions below.

The settlement preserved for GM a potential reverter from the settlement fund, but only if class members' claims did not exceed certain predetermined amounts. As it turned out, class members' claims, fees awarded to plaintiffs' counsel and expenses of administration fully exhaust the cash settlement fund, whether or not counsel receive a multiple.

In February 1987, the district court awarded fees of $1,989,661 out of the settlement fund to the lawyers representing the plaintiff class. In making this award, the district court first reduced counsels' lodestar fees by more than $800,000 and also denied any enhancement for the risk of nonpayment. *Skelton v. General Motors Corp.*, 661 F. Supp. 1368 (N.D. Ill. 1987), *aff'd in part and rev'd in part*, 860 F.2d 250 (7th Cir. 1988). In October 1988, the Seventh Circuit reversed the denial of any enhancement for risk and

remanded the case to the district court to determine whether there was risk of nonpayment when the litigation began, and if so, what if any risk multiple should be awarded to plaintiffs' counsel. *Skelton v. General Motors Corp.*, 860 F.2d 250 (7th Cir. 1988). GM sought rehearing and rehearing en banc, and both were denied with no judge voting to rehear the case.

On remand to the district court, there was extensive briefing on the issue of whether a risk multiple was appropriate in this common fund case. In February 1989, plaintiffs' counsel introduced as evidence the affidavits of eight prominent attorneys representing a cross section of the bar, ranging from the largest commercial firms to small public interest practitioners. App. at 1a-27a. These affidavits demonstrated that plaintiffs in a large contingent fee class action would have substantial difficulty finding competent counsel to represent them in this area without the prospect of some enhancement for risk above their regular rates. GM offered no evidence of any kind to counter the affidavits produced by plaintiffs' counsel.

After several hearings and considering the affidavits submitted by plaintiffs' counsel, the district court made specific findings including: (i) there were risks of nonpayment when the litigation began; and (ii) without the prospect of some fee enhancement for the risks of nonpayment, plaintiffs would have had substantial difficulty in retaining counsel in a contingent class case in this market (App. at 29a). Based on these specific findings, the district court awarded plaintiffs' counsel a risk multiple of 1.6 applied to their reduced lodestar fees previously awarded. Because GM elected not to seek a stay of the court of appeals' mandate or any of the orders of the district court, final distributions have been made to all class members and all fees and expenses to plaintiffs' counsel have been paid. The entire settlement fund has been paid out, and as the district court has stated and GM cannot deny, GM has no possible reverter from the settlement fund because any amounts returned if the multiple award is reversed would

be paid to the class, not GM. Thus, GM has no economic stake in the issue for which it seeks review in this Court.

With all distributions made and the settlement fund fully exhausted, 64,828 plaintiff class members received payments averaging $264 each before legal fees, or approximately 77% of their eligible repair expenses related to defective THM 200 transmissions. With the risk enhancement of 1.6 allowed by the district court, plaintiffs' counsel have been paid a total of $3,183,458 in legal fees, or approximately 15% of the total value of the settlement to the plaintiff class.

GM filed its petition for a writ of certiorari on May 12, 1989. On May 23, 1989, the district court made the additional factual finding that "without an adjustment for risk the plaintiffs would have faced substantial difficulties in finding counsel in this market." App. at 29a. Thus, GM's petition did not address the fact that respondents satisfied the requirements of *Delaware Valley II*, as well as those applicable to common fund cases. On May 26, 1989, GM appealed the order in which the district court awarded the 1.6 multiple. A motion to dismiss this appeal based upon the provisions of the settlement agreement has been filed and is pending before the Seventh Circuit.

REASONS FOR DENYING THE WRIT

I. Because GM Has No Economic Interest In This Appeal, It Lacks Standing To Bring Its Petition For Certiorari

GM lacks standing to bring its petition for certiorari. Any reversal of the lower court decision will have absolutely *no impact on GM*. If the multiple were overturned, GM would receive not one cent nor would any ruling or order which has any impact on GM be changed. Any increase in the fund would go exclusively to class members.

GM is pursuing this petition because it is opposed to any precedent supporting fee awards and it is in GM's interest to make fee awards as difficult as possible for plaintiffs' attorneys. However, in connection with the settlement, GM bargained for and received a blanket release including any liability for attorneys' fees. Now, with no direct interest in the proceeding, GM is in effect petitioning for certiorari as an *amicus curiae.* While an *amicus curiae* may support or oppose an action by this Court, it cannot seek to have the Court act on its own behalf. That is exactly what GM is attempting to do.

GM had the potential for standing in the district court because of its possible reversionary interest in the settlement fund. *See Boeing Co. v. Van Gemert,* 444 U.S. 472, 481 n.7 (1980). But GM no longer has an economic stake in the action. Any possible reversionary interest by GM in the settlement fund has been foreclosed by claims already made against the fund. The fee issue is moot as to GM, and GM has "no cognizable interest in further litigation between the class and its lawyers over the amount of the fees ultimately awarded from money belonging to the class." *Id. See also Copeland v. Marshall,* 641 F.2d 880, 905 n.57 (D.C. Cir. 1980) ("In 'common fund' cases, the losing party no longer continues to have an interest in the fund; the contest becomes one between the successful plaintiffs and their attorneys over division of the bounty."). Absent any " 'colorable claim for the return of [any] excess,' " GM "has no more standing to press its appeal than would a losing defendant have standing to contest the division of an award between plaintiff and his attorney pursuant to a contingent-fee arrangement." *Boeing,* 444 U.S. at 488, 489 n.4 (Rehnquist, J., dissenting).

Standing under Article III of the U.S. Constitution requires that a party who seeks to invoke a federal court's jurisdiction show that: (i) he or she personally has suffered some actual or threatened injury, economic or otherwise; (ii) the injury " 'fairly can be traced to the challenged action' ";

and (iii) the injury is likely to be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted). An actual live controversy must exist at all stages of litigation, not merely at the time the complaint is filed. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *De Funis v. Odegaard*, 416 U.S. 312, 319 (1974). GM satisfies none of these requirements.

Nor is GM a proper party to pursue this petition on behalf of the class. While GM purports to represent the interests of the thousands of persons it injured in selling cars with defective transmissions (Pet. at 9), its interests in fact are quite opposite. GM's position has been adverse to the class throughout the nine year course of this litigation. GM does not represent the class, nor can it seek certiorari on behalf of the class. A petitioner "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). *See also United States v. SCRAP*, 412 U.S. 669, 687 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

In federal common fund litigation, it is the district court, not the defendant, that has the "special obligation to ensure that the fee is fair." *Copeland*, 641 F.2d at 905 n.57. The district court here recognized and fulfilled this obligation: "[T]he Court . . . is now in a position of representing the class in a sense because General Motors has agreed to pay out and will pay out the full amount . . . ." App. at 31a. Moreover, no member of the only "party" with proper standing—the class itself—filed objections to the fee awards or has supported GM in its arguments in the court of appeals or in this Court. Nor has any class member obtained additional counsel with which to litigate this issue. The absence of any class support for GM's position is not surprising; the class of over 64,000 claimants received the benefits of one of the largest and most successful class recoveries in recent years.

GM's sudden concern for the class it battled against so staunchly rings hollow. GM cannot don the class's mantle, just as it cannot claim any economic stake in the fee issue it now presses. What it boils down to is that GM has no standing, and a petitioner "who [does] not possess Article III standing may not litigate as [suitor] in the courts of the United States." *Valley Forge Christian College*, 454 U.S. at 475-76.

II. Statutory Fee Provisions And The Common Fund Doctrine Are Two Distinct Legal Theories To Which Courts Apply Different Standards For Decision; GM Fails To Address This Point

Contrary to GM's assertion, this case does not concern the award of fees to the *plaintiffs* from the defendant GM under the Magnuson-Moss Act. Rather, plaintiffs' *counsel* were awarded fees from the plaintiff class through a common fund settlement established by counsels' efforts. In common fund cases, the court employs its equitable powers to divide the gain obtained through counsels' efforts. In statutory fee-shifting cases, the court enforces an explicit congressional intent to ensure compliance and impose an additional penalty on the defendant. The statutory fee and common fund doctrines are not substitutes for one another; they are separate rules for separate situations governing the relative rights of different sets of parties. A failure to draw this basic distinction pervades GM's petition.

Although this case commenced under several distinct legal theories—only one of which was the Magnuson-Moss Act—it ended with a class recovery for all the claims to which the common fund doctrine applies. Once the common fund was created through the settlement of a wide range of claims, it became the obligation of the district court to award attorneys' fees from the fund based upon its equitable powers. *Boeing*, 444 U.S. at 478; *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392-93 (1970); *Sprague v. Ticonic Nat'l Bank*, 307

U.S. 161, 166 (1939).[1] To award attorneys' fees from a common fund "is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." *Mills*, 396 U.S. at 396-97.[2]

This Court has distinguished statutory fee cases from common fund cases. The common fund doctrine has been described as operating "in addition to" statutory fee provisions. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 n.6 (1986). Statutory fee cases are also distinguishable from cases "where any plaintiff, impecunious or otherwise, has a damages case that competent lawyers would take in the absence of fee-shifting statutes." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 726 (1987) ("*Delaware Valley II*"). In *Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984), Justice Powell also recognized that "reasonable fees" under statutory authority and the common fund doctrine are not the same.

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[1] The fact that this action was commenced, in part, under a statute with a fee-shifting provision does not, as GM maintains, preclude an award under the common fund doctrine. To the contrary, when a case is "settled by the creation of a fund in exchange for the release of the defendants from liability both for damages and for statutorily authorized fees," it is converted into a common fund case. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 582 (3d Cir. 1984). *See also* THIRD CIRCUIT TASK FORCE, *Court Awarded Attorney Fees* (1985).

[2] By its terms, the Magnuson-Moss Act is inapplicable to an award of fees from a common fund. The fee award provision of the Act provides:

> If a *consumer* finally prevails in any action brought under paragraph (1) of this subsection, *he* may be allowed by the court to recover *as part of the judgment* a sum equal to the aggregate amount of cost and expenses. . . .

15 U.S.C. § 2310(d)(2) (1982) (emphasis added). Any award of fees under the Act is payable to the *consumer* from the *defendant*. Plaintiffs' counsel had no standing to seek and the district court had no authority to award fees "under" the Magnuson-Moss Act.

GM relies almost exclusively on decisions which involve statutory fee awards. *Delaware Valley II*, the case upon which GM places chief reliance, is a statutory fee case. However, there is no hint anywhere in the opinions of the four-justice plurality, Justice O'Connor's concurrence or the four-justice dissent that the issues involved in *Delaware Valley II* have any bearing on the propriety of a risk multiplier in a common fund case. More to the point, GM is incorrect in its assertion that the same legal standards govern common fund and statutory fee cases. GM does not provide any analysis why the same or similar standards should apply to rights arising from totally different legal foundations (statutory vs. equitable) and in which divergent and conflicting considerations of policy and fairness are called into play.[3] Statutory fee provisions impose what amounts to a penalty on the defendant in order to assure compliance with certain statutes; the fees are awarded to the plaintiffs, not their lawyers. The purpose of the common fund doctrine is to impose and spread costs (including risk) on those who reap the benefits.

The principal objections to risk multipliers which have been raised in statutory fee cases are nonexistent in common fund cases. The use of multipliers in statutory fee-shifting cases, courts fear, may conflict with the statutory requirement that fees be awarded only to "prevailing parties" by compensating attorneys indirectly for prior cases which they did not win. *See Delaware Valley II*, 483 U.S. at 725. Fees paid by the plaintiffs as a result of the common fund doctrine face no such statutory prescription and do not involve any statutory interpretation. Courts are also concerned that an award of risk multiples under fee-shifting statutes will penalize the unlucky defendant who initially had a strong case but lost

[3] After a thorough analysis of court awarded fees, the Third Circuit Task Force concluded: "The Task Force believes that a distinction must be drawn between fund-in-court cases and statutory fee cases since the policies behind the two categories differ greatly." *Court Awarded Attorney Fees* at 13.

anyway. *Id.* at 722. However, awarding a risk multiple in a common fund case increases the return to the attorneys who bore the risk, but only at the expense of the plaintiffs for whose benefit the risk was undertaken. This is in stark contrast to the anomalous result posited by GM in statutory fee cases where the defendant pays for the risk the attorneys undertook on plaintiffs' behalf—and arguably pays a higher premium when its position was more defensible in the first place.

The distinction between the parties in interest also underscores the basic fallacy of GM's argument that no multiple would be available if plaintiffs' counsel had tried the case. If this case had gone to trial with a final judgment for the plaintiff class on a fee-shifting claim in the aggregate amount of $20 million, counsel, *on behalf of the plaintiffs,* would have sought an award of fees *from* GM in addition to the actual damages of $20 million. Suppose the fee award, as per the four-justice plurality in *Delaware Valley II,* was $2,000,000 with no risk multiple. Counsel for the class have no fee agreement with class members—they never do in class actions. Under Magnuson-Moss, the $2,000,000 fee would belong to the plaintiff class members, not to counsel. Counsel would then petition the court for an award of fees *from the entire fund* of $22 million including damages *and* statutory fees. An award of fees from the total fund of $22 million would be made under the common fund doctrine and the award of fees to counsel from the fund would not be limited to the statutory fees awarded from the defendant. [4] Though

[4] The Seventh Circuit in *McKinnon v. City of Berwyn,* 750 F. 2d 1383, 1393 (7th Cir. 1984), recognized the distinction between the "reasonable" fees awardable to a *plaintiff* under a statutory fee provision and the amount which *plaintiffs'* attorneys are entitled to receive if they prevail to a litigated judgment:

> Suppose the contingent fee were 40 percent of the sum of the damages and attorney's fees awarded (as is common), and the jury awarded $100,000 in damages and the judge awarded $20,000 in attorney's fees (without consideration of a possible risk multiplier), thus entitling the plaintiff's attorney to a total fee of $48,000—more than twice the reasonable attorney's fee calculated by the judge.

counsel and the class may have adverse interests in allocating the fund, they have the same fundamental interest—maximizing the total amount of the fund.

In contrast to risk enhancement under statutory fees, the common fund doctrine correctly aligns risk and return. Class counsel are given a higher return by reducing the recovery of the plaintiffs whom they represented on a contingent basis. Plaintiffs' counsel undertook risk for the benefit of plaintiffs and plaintiffs "pay" for that risk taken by receiving a smaller amount from the fund. The defendant is indifferent, since it pays the same amount whether or not plaintiffs were represented on a contingent basis. The defendant bears the penalty and the risk of statutory fees but not the risk that plaintiffs were represented on a contingent basis. That risk is borne by plaintiffs through a risk multiple if suit is successful, and by their attorneys if it is not.

Risk multipliers in common fund cases, where the premium is paid by the plaintiff class, are analogous to the fees paid to lawyers in common law tort contingency fee cases. As in common fund cases, the attorney is compensated for bearing an additional risk, risk that would otherwise be carried by clients who pay as they go. The heart of the request for a risk multiplier in a common fund situation is the contingent nature of the attorney's fee arrangement with his or her clients. The attorney requests reasonable compensation for assuming the risk of nonpayment, *i.e.*, for making a risky loan of services to the client. Judge Posner has accurately explained the nature of the contingent arrangement:

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is high because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans, and the total amount of interest is large not only because the interest rate is high but

> because the loan may be outstanding for many years—and with no periodic part payment, a device for reducing the risk of the ordinary lender.

R. POSNER, ECONOMIC ANALYSIS OF LAW § 21.9 at 534-35 (3d ed. 1986). The multiplier is commensurate with the risk of the loan the attorney is making to his or her client. It is in effect a nonrecourse loan to the client, a loan which economically requires a premium—but a premium payable by the client.

Contrary to GM's assertion, the Seventh Circuit's opinion does not require the award of a risk multiple in a common fund case; it simply instructs a trial court to determine with specific findings whether there was sufficient risk of nonpayment to justify a multiple. *Skelton,* 860 F.2d at 258. Thus, risk multiples would be improper where no appreciable risk of nonpayment is present at the start of the litigation, and where there would be little if any difficulty retaining counsel, *e.g.*, a civil antitrust suit where the defendant had already been found guilty in a criminal trial.[5]

GM does not, and cannot, cite even one decision of this Court—or for that matter any other federal court—that holds that enhancement for risk is, as a matter of law, impermissible in a common fund case. GM simply wishes to discourage *any* consumer litigation against it—by making it virtually impossible for competent counsel to take these cases.[6]

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[5] Courts awarding attorneys' fees in common fund cases after *Delaware Valley II* have denied any multiple in appropriate situations. *See, e.g., Schwartz v. Novo Industri A/S,* 119 F.R.D. 359 (S.D.N.Y. 1988); *In re Wicat Sec. Litig.*, 671 F. Supp. 726 (D. Utah 1987).

[6] The position of plaintiffs' lead counsel, Sachnoff & Weaver, supports this point. Sachnoff & Weaver is a 90 person law firm with an active commercial practice, including corporate, securities, real estate, tax and probate as well as a diverse litigation practice. Our firm would not have taken part in a complex contingent fee ten-year lawsuit against the world's largest industrial corporation with its phalanx of skillful and tenacious lawyers without the prospect of some risk enhancement.

III. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF ALL CIRCUITS THAT HAVE ADDRESSED THE ISSUE

The Seventh Circuit's decision is neither novel nor ground-breaking. Rather, the Seventh Circuit's narrow holding that in common fund cases a multiple based on the risk of nonpayment *may* be appropriate, in certain circumstances and only if based upon specific findings by the trial court, is fully consistent with the decisions of all circuits that have addressed the issue of common fund fee awards.

The lodestar/multiple approach to fee awards in common fund cases was first articulated by the Third Circuit in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), *aff'd in part and vacated in part*, 540 F.2d 102 (3d Cir. 1976) and *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) ("*Lindy II*"). The *Lindy II* court found that in addition to the lodestar, a reasonable attorneys' fee award in a common fund case included a reflection of the contingent nature of success—"[t]he probability or likelihood of success, viewed at the time of filing suit." 540 F.2d at 117. The Third Circuit has consistently affirmed the rule of law set forth in the *Lindy* decisions regarding common fund fee awards. *See, e.g., In re Fine Paper Antitrust Litig.*, 751 F.2d 562 (3d Cir. 1984). The Seventh Circuit's decision wholly conforms with the *Lindy* decisions.

The Second Circuit specifically adopted the *Lindy* analysis in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974). In *Grinnell*, the settlement of a national antitrust class action resulted in a common fund. The Second Circuit held that the lodestar fee could be enhanced based on the "risk of litigation." *Id.*

The law in the Eighth Circuit is the same. In *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 128 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975), an antitrust class action resulting

in a common fund, the Eighth Circuit also applied a risk analysis test: "The *Lindy* standards as interpreted in *City of Detroit* . . . provide the appropriate test for determining any discretionary fee award in a class action context."

In *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980), where the settlement of a class antitrust action resulted in a common fund, the Fifth Circuit utilized the same approach. Relying upon *Lindy, Grinnell* and *Grunin,* the court determined that the fee award should be determined under the lodestar analysis, and thereafter modified to take into account "the contingent nature of success." 624 F.2d at 583 n.15. In a subsequent decision, the Fifth Circuit adopted the common fund fee award analysis based on risk and clarified the meaning of the "contingent nature of success" as "the probability or likelihood of success, viewed at the time of filing suit." *Graves v. Barnes,* 700 F.2d 220, 222 (5th Cir. 1983) (quoting *Lindy II,* 540 F.2d at 117).

The Ninth Circuit has applied the same reasoning to common fund fee award decisions. In *Loring v. City of Scottsdale,* 721 F.2d 274, 276 (9th Cir. 1983), the Ninth Circuit remanded a district court's fee award in a common fund case with instructions to determine "whether some multiplier is justified by the contingent nature of the case."

The law in the District of Columbia Circuit regarding multiples in common fund cases is also consistent. "With regard to the contingent nature of success, it may be appropriate in some circumstances to compensate counsel for the risk as seen at the start of the litigation that the suit would be unsuccessful and that no fees would be forthcoming." *Bebchick v. Washington Metro. Area Transit Comm'n,* 805 F.2d 396, 403 (D.C. Cir. 1986).

The uniformity in this area is striking. GM does not, and cannot, cite any authority disputing the uniformity of decisions of all federal courts discussing the issue of attorneys' fees in cases with common fund recoveries, most of which

began under fee-shifting statutes.[7] The reason is clear. The court of appeals decision here is consistent with the decisions of all courts that have addressed the common fund fee award issue.[8]

IV. The Unique Facts And Circumstances Of This Case Support The Risk Multiple Awarded

The district found that this was a "unique case" (App. at 40a) which delved "into previously uncharted areas of the Magnuson-Moss Warranty Act." *Skelton*, 661 F. Supp. at 1380. These unique facts and the district court's findings (both written and oral) based upon the extensive factual record before it overwhelmingly support the allocation of the common fund to include the modest 1.6 multiple for plaintiffs' counsel. A full exposition of the risks and facts presented to the district court is beyond the scope of this brief. However,

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[7] GM seriously miscites *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988). Pet. at 14-15. Respondents contacted plaintiffs' counsel in *Norman* who confirmed that the court in *Norman* awarded fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), which were payable *by the defendant*, not out of any fund. *See* App. at 34a-38a. Similarly, *Student Pub. Interest Research Group, Inc. v. AT&T Bell Laboratories*, 842 F.2d 1436, 1438 (3d Cir. 1988), "involve[d] an appeal and cross appeal from an order of the district court awarding counsel fees to prevailing parties (two public interest groups) pursuant to the fee shifting provisions of the Clean Water Act . . . ."

[8] Although other circuits have not squarely addressed risk multiples in common fund cases, the district courts in those circuits have long recognized that multiples based upon the risk of nonpayment may be appropriate. *See, e.g.*, (1st Cir.): *Pavlidis v. New England Patriots Football Club, Inc.*, 675 F. Supp. 707, 709 n.1 (D. Mass. 1987); (4th Cir.): *Edmonds v. United States*, 658 F. Supp. 1126, 1148 (D. S.C. 1987); (6th Cir.): *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 640 F. Supp. 697, 702-03 (S.D. Ohio 1986); (10th Cir.): *Brewer v. Southern Union Co.*, 607 F. Supp. 1511, 1531 (D. Colo. 1984); (11th Cir.): *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679, 700-02 (M.D. Ala. 1988).

counsel did represent plaintiffs on an entirely contingent basis. Plaintiffs would not have paid their counsel any fee, either directly or through a fund, if a recovery had not been obtained. This was not an idle supposition in the case at bar. To counsel's knowledge, this case was the first nationwide product defect case *ever* certified. The district court itself found that this case involved "great uncertainty" and that "it would be difficult to have great assurance as to what the ultimate verdict" would be. App. at 43a-44a, 47a.

Moreover, the total fees awarded are fair and reasonable when viewed as a percentage of the recovery. The lodestar fee award of $1,989,661, adjusted by a multiple of 1.6, resulted in total legal fees of $3,183,458, just 15% of the $21 million total value of the settlement. This Court in *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), recognized the propriety of using the percentage of recovery method as a guideline in determining the reasonableness of fees in common fund cases. Even with the 1.6 multiple, the class here was assessed a fee of 15%, substantially less than the market rate for contingent fees. Class members could not have retained attorneys to press their individual claims against GM for anywhere close to a 15% contingent fee.

V. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE DECISION IN *DELAWARE VALLEY II* OR ANY OTHER DECISION OF THIS COURT

In its zeal to chill any litigation against it for marketing defective products, such as its THM 200 transmission, GM has distorted the holding and the opinions of this Court in *Delaware Valley II* beyond all recognition. Furthermore, plaintiffs' counsel have satisfied even the more stringent requirement for a risk multiplier under statutory fee-shifting cases set forth in *Delaware Valley II*, a fact which completely

undermines GM's claimed justification for obtaining certiorari.[9]

In *Delaware Valley II*, a plurality of four justices, plus Justice O'Connor in her concurrence, held that under the facts *of that case* and analyzed under the fee-shifting statute involved, a risk multiplier was not appropriate. 483 U.S. at 734. In the plurality opinion four justices concluded that in *fee-shifting* cases risk multiples were not appropriate. *Id.* at 727. Alternately, the plurality held that in exceptional cases, where risk enhancement may be appropriate, it should be small and in any event based on a finding that without risk-enhancement the plaintiff "would have faced substantial difficulties in finding counsel" in the local market. *Id.* at 733. Four justices dissented, contending that Congress did not intend to prohibit risk multiples, and that the availability of risk multiples under proper circumstances was essential to the statutory scheme under most fee-shifting statutes. *Id.* at 755. Justice O'Connor agreed with the dissent regarding Congress's intent, and concluded that before adjusting for risk, the trial court must find that without enhancement for risk plaintiffs would have faced substantial difficulties finding counsel in the relevant market. *Id.* at 731, 733.

What emerges from a correct analysis of the Court's opinions in *Delaware Valley II* is not GM's distorted charac-

[9] While the perspectives are different, with statutory fee cases focusing on congressional intent and common fund cases on fairness between the class and their counsel, the standards in each case are, in significant measure, two sides of the same coin. In common fund cases the court is really assessing whether the risk undertaken merits compensation, *i.e.*, hypothetically if the plaintiffs had gotten together, would the "market" have required them to pay a premium for taking the case on a contingent basis. In statutory fee cases the inquiry is somewhat more complex and restrictive—because the multiple is being extracted from the defendants, not the plaintiffs, and the statute only allows fees for prevailing parties. Still, the inquiry is essentially the same—would the "market" demand a risk multiple in order to provide representation to the plaintiffs?

terization, but that five justices would allow a risk multiple in fee-shifting cases under appropriate circumstances, and even the four-justice plurality, in its alternate position specifically endorsed by Justice O'Connor, would also allow enhancement for risk.

Plaintiffs' counsel here took the extraordinary step of satisfying the exact standard articulated by Justice O'Connor in her concurrence as if this case were a statutory fee-shifting case—which it is not. The detailed affidavits submitted by counsel demonstrate that the plaintiffs here would have encountered substantial difficulties in retaining counsel without the prospect of a risk enhancement if successful. The district court, relying on these unrefuted affidavits and its own knowledge and experience, made a specific finding that more than satisfies the propriety of a risk multiple even if this had been a statutory fee-shifting case. In its order of May 23, 1989, the district court, after hearing GM's objections on the record, found "that without an adjustment for risk the plaintiffs would have faced substantial difficulties in finding counsel in this market." App. at 29a. It is telling that although it had four months to do so, GM was unable to produce one shred of evidence, not a single affidavit, to rebut the truth of plaintiffs' counsel affidavits or the correctness of the district court's finding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LOWELL E. SACHNOFF
Counsel of Record
JEFFREY A. SCHUMACHER
GARY S. CAPLAN
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Counsel for Respondents

July 14, 1989

Appendices

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendants.

No. 79 C 1243
Class Action
Honorable John Nordberg

JOSEPHINE C. NEWTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendants.

No. 80 C 2151

AFFIDAVIT OF DOUGLASS W. CASSEL, JR.

DOUGLASS W. CASSEL, JR. on oath states as follows:

1. I am a 1972 graduate of Harvard Law School. I was admitted to the Bar of the State of Maryland in 1972, and in 1976 I was admitted to the Bar of the State of Illinois. I have practiced continuously in the Chicago legal community since that time.

2. I am presently on a four month leave as General Counsel of Business And Professional People for the Public Interest ("BPI"), a nonprofit law center in Chicago, whose attorneys work on a broad range of public interest legal

matters including civil rights, civil liberties, consumer and environmental law among other fields, in which attorneys' fees are often awardable to a prevailing plaintiff pursuant to various statutory authorizations. In connection with my work at BPI, I have been extensively involved for the last 13 years in class action and test case litigation before federal and state courts and administrative agencies in Chicago, including actions under federal statutes such as the Civil Rights Act and federal environmental laws. In connection with such matters, I have worked extensively with many attorneys in private practice in the Chicago area on both sides of such litigation, including numerous efforts undertaken by me and other BPI attorneys to recruit volunteer assistance from the private bar.

3. BPI is a not-for-profit corporation and is supported principally by donations from supporters. Accordingly, the criteria employed by BPI in deciding whether or not to undertake litigation are substantially different from that of private practitioners. BPI undertakes representation of cases based upon our assessment of the public importance of the litigation (as well as other factors such as the likelihood of success and the availability of alternative representation, if any, for the litigant), without regard to remuneration in the event that the litigation is successful. I understand, however, that private practitioners do not and cannot afford to select their cases based on the same criteria.

4. Based on my experience with members of the Chicago Bar, I have come to have what I believe to be a reliable understanding of the principal factors that private practitioners consider in determining whether to undertake the representation of plaintiffs in complex civil litigation on a contingent fee basis. In my experience, private practitioners in the Chicago area do not undertake the representation of plaintiffs in complex civil litigation on a contingent fee basis unless those practitioners believe that they have a strong likelihood of receiving substantially more than their normal

hourly rates in the event that they prevail. While private practitioners quantify the hourly-rate enhancement differently depending on various facts and circumstances, the private practitioners with whom I am familiar typically require an expectation of two or more times their normal hourly rates in order to undertake complex civil litigation on a contingent fee basis.

5. Various federal statutes and causes of action provide for the payment of attorneys' fees either through express provisions in the statutes or through the Equal Access To Justice Act. Because of a growing perception of a reluctance of the federal courts in this circuit to award attorneys for prevailing parties in such cases fees commensurate with the substantial risk and delay in payment involved in undertaking such matters, BPI has received an increasing number of requests for representation in the last few years from persons unable to find counsel willing to undertake substantial litigation on a contingent fee basis. Because BPI has very limited resources and there are usually few other relevant nonprofit agencies, if any, we are increasingly having to turn away clients without referring them to any other office or attorney willing to take their case.

6. It is my belief that a plaintiff in the Chicago legal community wishing to bring a complex civil action would face substantial difficulty in finding competent counsel in the private bar to undertake such representation on a contingent fee basis unless there is, in the view of counsel, the reasonable expectation of receiving compensation substantially more than their normal hourly rates.

/s/ DOUGLASS W. CASSEL, JR.
DOUGLASS W. CASSEL, JR.

SUBSCRIBED and SWORN
to before me this ____ day of
February, 1989.

_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 79 C 1243 Class Action Honorable John Nordberg
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 80 C 2151

AFFIDAVIT OF PAUL E. SLATER

I, Paul E. Slater, being first duly sworn, state as follows:

1. I am a partner with the law firm of Sperling, Slater & Spitz in Chicago, Illinois. I have been admitted to practice in the courts of Illinois and in the Federal District Court for the Northern District of Illinois since 1970.

2. From September 1970, to September 1971, I was on the faculty of the University of California Law School (Boalt Hall), Berkeley, teaching legal writing and civil procedure. From September 1971, to September 1972, I was an assistant professor of law at the University of Connecticut School of Law, and from September 1972, to January 1976, I was assistant and then an associate professor of law teaching

antitrust law at Northwestern University Law School. In January 1976, I resigned my appointment to the full time regular faculty at Northwestern and commenced the private practice of law. I have remained, however, as an adjunct professor of antitrust law at Northwestern and teach courses in antitrust practice and procedure at Northwestern in the second semester of each year.

3. Since entering private practice 13 years ago, my practice has been exclusively in the area of complex business litigation and in particular, antitrust cases. I am familiar with the market for legal services in large, complex cases.

4. Our firm has been asked to take cases in this area on a contingent fee basis on behalf of plaintiffs where our fee would be dependent on the success of the litigation. In assessing whether to take a case on a contingent basis, our firm is guided by what we perceive to be the extreme riskiness of legal claims in this area of the law. Even in a case which we believe to be fundamentally sound, we will ask as our fee for a portion of any judgment in favor of our client which corresponds roughly to a 3.0 multiplier of our best estimate of our usual hourly rates for the work necessary on the case. We find that a multiplier of this magnitude is necessary because of the risk of non-payment; the risk that the facts will develop differently or in addition to the facts of which we are first advised; the risk that the law will change before the case is resolved; and the risk that even if we ultimately prevail, we may have to wait 10 years or more before we realize any compensation for our efforts.

5. We usually attempt to translate the anticipated multiplier into a percentage of the judgment based upon our evaluation of the prospect of success and the size of any likely judgment. Typically, we seek anywhere from 25% to 40% of the judgment in order to provide the return necessary to induce us to take a complex case on a contingent fee basis. Even then we politely decline to take the vast number of contingent fee cases offered to us.

6. In my experience, other firms in Chicago would only accept similar contingent fee cases based on contingent fee arrangements similar to the ones that we would accept.

7. Even with an anticipated multiplier of 3.0 for contingent work, my firm is reluctant to accept contingent cases because of the high risk inherent in such cases. We much prefer to work for our regular hourly rates paid on an ongoing basis.

/s/ PAUL E. SLATER
PAUL E. SLATER

SUBSCRIBED and SWORN
to before me this ____ day of
February, 1989.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 79 C 1243 Class Action Honorable John Nordberg
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 80 C 2151

AFFIDAVIT OF GARY M. ELDEN

Gary M. Elden, being first duly sworn, states as follows:

1. I am a 1969 graduate of Harvard Law School. I was admitted to practice in the State of Illinois in 1969 and have practiced in Chicago continuously since that time.

2. I am a partner in the law firm of Grippo & Elden. Prior to the formation of Grippo & Elden, I was a partner in the firm of Isham, Lincoln & Beale. Prior to the merger of Isham, Lincoln & Beale and Reuben & Proctor, I was a partner in the firm of Reuben & Proctor and a member of its Executive Committee. Prior to the formation of Reuben & Proctor, I was a partner in the law firm of Kirkland & Ellis. Throughout this time, my individual practice has consisted

almost exclusively of complex civil litigation, predominantly in federal courts. Over the years, I have been involved in more than 30 class actions, both in Chicago and other parts of the country. Most such cases have involved federal securities litigation. In connection therewith, I had considerable contact with most of the plaintiffs' class action bar in this legal community and a substantial number of the principal firms involved in such matters across the country.

3. I am thoroughly familiar with my firm's billing practices (as well as those of Isham, Lincoln & Beale and Reuben & Proctor) and the considerations that attend a decision by our firm to undertake a client's representation. We do not undertake the representation of plaintiffs in any sort of litigation on a purely contingent fee basis. It is our judgment that the potential benefits of such representation are substantially outweighed by its risks and by the delay in payment even in cases where a recovery is ultimately achieved. Accordingly, we only undertake representation of clients where payment is made on an hourly basis.

4. I am aware that there are some attorneys and firms in Chicago and in other areas of the country that will undertake complex civil litigation on a purely contingent basis. Based on my familiarity with such attorneys in this area of the law, it is my understanding and belief that those attorneys will undertake such cases only if they believe that it is realistic to expect that they will receive roughly two to three times their normal hourly rates in the event of success. I am personally familiar with a number of attorneys whose practice has changed considerably in recent years, shifting away from or reducing their involvement in contingent federal class action work because of the uncertainty that fee award decisions in recent years have injected into this area.

5. Based on my personal knowledge as set forth above, it is my firm belief that a person would face substantial difficulty in finding competent representation in the Chicago area to represent him or her in a complex civil litigation matter on a contingent fee basis unless counsel believed he or she had a probability of receiving substantially more than double the regular hourly rates in the event the litigation succeeded.

/s/ GARY M. ELDEN
GARY M. ELDEN

SUBSCRIBED and SWORN
to before me this____day of
February, 1989.

_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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ARLIE GLEN SKELTON, *et al.*,
Plaintiffs,

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GENERAL MOTORS CORPORATION,
Defendants.

No. 79 C 1243
Class Action
Honorable John Nordberg

JOSEPHINE C. NEWTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendants.

No. 80 C 2151

AFFIDAVIT OF GEORGE F. GALLAND, JR.

George F. Galland, Jr. states under oath:

1. I am an attorney licensed to practice law in the State of Illinois. I was admitted to practice in 1973 and have practiced in Chicago since that time. I am a partner in the firm of Davis, Barnhill & Galland, P.C. My practice has concentrated in the area of federal civil rights and other class action litigation. I have personally handled a large number of class action suits under the federal securities law, the federal antitrust laws, Title VII of the Civil Rights Act of 1964, and ERISA. I have not only handled such class actions, but have been called upon in a number of cases to decide on

behalf of my law firm whether my firm would become involved in proposed class actions.

2. My purpose in this affidavit is to describe the considerations that I and my firm take into account in deciding whether to undertake representation of a proposed plaintiff class in complex class action litigation. In addition, I have some familiarity, through my contact with other lawyers in the same field on both sides, with considerations that prevail generally in the legal community in Chicago and elsewhere before lawyers become involved in such actions.

3. In general, I operate under the assumption that a class action of the type typified by the *Skelton* case will be a long and expensive undertaking for my firm. The major class actions that my firm has handled have taken at least four years from filing to conclusion, whether that conclusion was a settlement, a victory in court, or a loss in court. For example, the class action *Mays v. Motorola, Inc.*, No. 75 C 1753 (N.D. Ill.), took six years from filing to final disposition after a successful trial followed by a settlement. *Liberles v. Daniel*, No. 73 C 3217 (N.D. Ill.), a Title VII class action, took ten years from filing till final disposition. The class action *Phemister v. Harcourt Brace Jovanovich, Inc.*, No. 77 C 39 (N.D. Ill.), under the antitrust laws, took six years from filing in 1977 to settlement in 1983. At least ten other class actions handled by this firm took similar amounts of time. These class actions were also expensive. For example, in the class action *McBride v. Burlington Northern, Inc.*, No. 78 C 269; No. MDL 374 (N.D. Ill.), my firm advanced or obligated itself for over one million dollars in costs that it would clearly have been unable to recoup from the named plaintiffs in the event the case had been lost.

4. These cases obviously carry substantial risks of partial or total loss. Aside from a number of cases settled for far less than had originally been hoped for (resulting in little payment to my firm for the work that had been required), at least three of my firm's class actions resulted, after years of

litigation, in a total loss for the class claims: *Coates v. Johnson & Johnson,* 756 F.2d 524 (7th Cir. 1985); *Martino v. McDonald's,* 1985-2 Trade Cas. ¶ 66,885 (N.D. Ill. 1985); and *Washington v. Pierce,* 576 F. Supp. 473 (N.D. Ill. 1983). Of perhaps twenty major federal and state class actions my firm has handled, at least seven of these cases have proceeded to trial and several others were litigated through trial court summary judgment and appeals when defendants refused to settle. My firm's experience has led me to assume at the start of a case that there is a substantial probability that the case may proceed to trial if the class is certified and that it may never settle at all. My experience as a defense lawyer bears that out. Of the three major certified class actions I have defended, my client forced the plaintiff to trial in one of them and has recently settled a second after losing on summary judgment in the trial court and precipitating years of appeals. In short, the idea that class actions are too big to try, or that they all settle, is in my experience untrue.

5. Because of these factors, my firm does not accept the representation of plaintiffs in class action cases unless it believes, at the beginning of the case, that there is a substantial probability of being paid, in the event of success, substantially more than the hourly rate that we bill our paying clients. (In fact, our contingent fee agreement with *individual* clients now includes a "multiplier" provision.) My firm has a substantial amount of such hourly paying business at rates ranging up to $250 per hour billed by senior partners. A decision to take class action plaintiffs' cases entails a decision to give such paying work second priority, and even to turn down such work under certain circumstances. My firm has never accepted a class action on behalf of plaintiffs without operating under the belief that in the event of success it could likely obtain some substantial sort of "multiplier" over the regular rates prevailing in the marketplace in the event of success.

6. Because it follows this policy, my firm, during the period from 1984 through 1987, accepted no new plaintiffs'

antitrust, securities, or Title VII Rule 23 class actions. The uncertainty among the Federal Courts of Appeals and the district courts as to whether a multiplier for risk could be contrast, we continued to accept state court class actions, because the Illinois courts look sympathetically on risk multipliers. We reevaluated this policy in light of the United States Supreme Court's decision in *Delaware Valley II*, which despite the lack of a majority opinion, allows the use of risk multipliers. It appears to us that both the Seventh Circuit and district courts are moving toward a recognition that risk multipliers can be awarded in class actions under fee-shifting statutes. Even so, we have remained cautious about committing major resources to Rule 23 cases, and we have initiated only one new such case, *Meiresonne v. Marriot Corp.*, a Title VII class action. Instead, we have shifted our emphasis to "opt-in" cases under the Age Discrimination In Employment Act, where we can reach individual fee agreements with individual clients that explicitly guarantee us a multiplier in the event that we win.

7. While I cannot speak for all lawyers and law firms, I hold the strong opinion, based on my discussions with my colleagues in this field, that firms capable of litigating complex cases will not invest time and money in this area on a contingent basis without the strong possibility of receiving a multiplier over their regular hourly rates in the event they win. This is particularly true in cases not preceded by government indictments. There is, so far as I can tell, no variation in the major cities of the United States in the attitude of plaintiffs' class action lawyers in this respect. They rightly regard themselves as practitioners in one of the most risky areas of the law, and they will not take cases without the expectation of substantial returns over prevailing non-contingent hourly rates in the event they prevail.

/s/ GEORGE F. GALLAND, JR.
GEORGE F. GALLAND, JR.

SUBSCRIBED and SWORN
to before me this 14th day of
February, 1989

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 79 C 1243** **Class Action** **Honorable John Nordberg**
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 80 C 2151**

AFFIDAVIT OF GERALD G. SALTARELLI

Gerald G. Saltarelli, being first duly sworn on oath, states as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I am a 1973 graduate of the University of Chicago Law School and I have been admitted to the practice of law in this State since 1973. I have practiced continuously in the Chicago legal community since that time.

2. I am a partner in the law firm of Butler, Rubin, Newcomer, Saltarelli & Boyd. My practice consists almost exclusively of complex litigation matters, mostly in federal court.

3. I am familiar with my firm's billing practices and the considerations that go into my firm's decision to undertake

representation of clients. Because of the substantial risk and delay in receipt of payment inherent in undertaking complex civil litigation on a contingent basis, our firm refuses to do so even when the plaintiff's case appears to be solid and potentially worth significant sums. Indeed, even in non-complex litigation, we do not represent clients on a contingent basis. With the exception of one plaintiff in a personal injury case, we have never handled any matter on a contingent basis. In our firm's judgment, the risk and delay in payment of contingent litigation substantially outweigh its benefits as compared to work done on a purely hourly basis. If in the future we were to consider undertaking the representation of a client on a contingent basis, I am confident we would do so only if we felt it were highly likely that, if successful, we would receive compensation substantially in excess of our normal hourly rates; even then, it is extremely unlikely that we would do so.

4. While there are certain attorneys and firms in the Chicago legal community that do undertake class actions and complex civil matters on a purely contingent basis, it is my experience and belief that those attorneys and firms do so only in those situations where they believe that there is a strong probability that, if successful, they will receive compensation substantially in excess of their normal hourly rates.

5. I have reviewed the Court of Appeals decision in this case. It is my belief that a plaintiff would face substantial difficulty in finding competent representation in this legal community for cases such as the case at bar if there were not the likelihood that counsel would receive a substantial enhancement of their normal hourly rates in the event they prevailed in the litigation.

/s/ GERALD G. SALTARELLI
GERALD G. SALTARELLI

SUBSCRIBED and SWORN
to before me this 14th day of
February, 1989.

Notary Public

IN THE UNITED STATES DISTRICT COURT
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ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 79 C 1243** **Class Action** **Honorable John Nordberg**
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 80 C 2151**

AFFIDAVIT OF DAVID C. ROSTON

David C. Roston, being first duly sworn on oath, states as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I graduated from Harvard Law School in 1967. I have practiced in Chicago for 21 years. I am a partner in the law firm of Altheimer & Gray in Chicago, where I am a litigator.

2. My firm handles a wide variety of litigation, some of which is undertaken on a contingent-fee basis. I am familiar with our firm's policies with respect to the representation of clients on a contingent-fee basis. My firm does not undertake the representation of plaintiffs in contingent-fee

matters of any kind, especially matters as complex as class actions, unless it is our analysis that, if successful, the firm has a reasonable expectation of recovering a fee of at least twice our normal hourly rates for the time expended on the case.

3. My firm is regularly involved in substantial antitrust matters and securities litigation on a class action basis and is also involved in complex civil litigation on an individual basis in a variety of matters, generally falling under the heading of commercial litigation. The contingent fee analysis my firm makes in all of these matters is the same as that described in paragraph 2 above, without regard to the specific subject matter of the litigation.

4. I believe that I am familiar with the factors considered by many Chicago lawyers in determining whether to undertake non-personal injury contingent fee litigation, including class actions. I believe that all of the lawyers with whom I have had contact who would consider undertaking such litigation on a contingent fee basis would do so only on the basis of an analysis similar to the one I described in paragraph 2 above.

5. In my opinion, plaintiffs in a complex civil litigation matter would have substantial difficulty in obtaining qualified counsel in the Chicago legal community on a contingent fee basis if it were not reasonable to expect to receive a fee substantially in excess of (approximately twice) the normal hourly rate for the time expended on the case.

/s/ DAVID C. ROSTON

DAVID C. ROSTON

SUBSCRIBED and SWORN
to before me this 14th day of
February, 1989.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 79 C 1243** **Class Action** **Honorable John Nordberg**
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 80 C 2151**

AFFIDAVIT OF KEVIN M. FORDE

Kevin M. Forde, being first duly sworn on oath, states as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I am a 1963 graduate of the Loyola University Law School, and have been admitted to the practice of law in Illinois since 1963. I am admitted to practice before the Supreme Court of the United States and the United States Court of Appeals for the Seventh Circuit, District of Columbia Circuit and Federal Circuit. I have tried and/or argued cases before the Northern District of Illinois, Central District of Illinois, Eastern District of Wisconsin, Southern District of New York, Central District of California and Southern District of Florida. I have served as President of the Chicago

Bar Association. Prior to that office I served on its Board of Managers and in the elected offices of Librarian, Treasurer, Second Vice President and First Vice President. I served two terms as Chairman of the CBA Class Action Litigation Committee. I am a member of the ABA and am Chair-Elect in the Rules and Procedure Committee of the Section on Torts and Insurance Practice. I have served as a member of other professional associations, boards and committees.

2. A substantial portion of the practice of my firm, Kevin M. Forde, Ltd., has been in class action litigation. I have written on the subject of class actions (*e.g.*, Forde, *Illinois' New Class Action Statute*, 59 Chi.B.Rec. 120 (1977)) and was the original proponent and principal draftsman of the Illinois Class Action Statute. I have personally handled a large number of class action lawsuits in both federal and state courts. Our firm is often consulted in class action cases and we have represented, as counsel, attorneys petitioning for fees in class action cases. These cases include, *e.g.*, *Sampson v. Eastman Kodak*, 86 CH 650 (Cir. Ct. of Cook County); *A.C.L.U. v. City of Chicago*, 75 C 3295 (N.D. of Ill.); *In re Illinois Congressional Districts Reapportionment Cases*, 81 C 3915 (N.D. of Ill.); *In re General Motors Engine Interchange Litigation*, MDL 308 (N.D. of Ill.).

3. It is the purpose of this affidavit to describe the factors which I and my firm consider in deciding whether to represent a plaintiff in a proposed meritorious class action or other complex litigation. Based on my experience in this legal community, it is my belief that those considerations are substantially similar to those which prevail in this legal community with regard to such matters.

4. It is my experience that an attorney proposing to undertake litigation of this sort must do so with the expectation that the case will take substantially more time and effort than will an even more complicated individual case involving the same legal subject matter. This is true not only because of the briefing and discovery with respect to class certification,

but because of the whole overlay of additional obligations and risks that devolve upon an attorney for the class once a case is certified (including but not limited to class notice procedures, communications with class members, etc.). It is also my experience that class action lawsuits are defended with particular vigor by exceptionally able counsel in part because of the increased liability faced by defendants by virtue of classwide liability. It is my expectation in assessing a meritorious potential class action lawsuit that it will place extremely heavy demands on my firm, and may well take four to six years to resolve.

5. It is my experience that class action litigation not only places onerous time demands on the attorney for the class, but also substantial financial demands, including out-of-pocket expenses which may be substantial.

6. The most imposing financial demand that the undertaking of class action representation places on the lawyer is that he or she is required to devote a substantial amount of time (and, during certain periods of the litigation, virtually *all* of his or her time) to a case which yields no current income, even though the attorney's expenses must be paid on a current basis. Rent, secretarial and support staff, non-equity attorneys in the firm, library upkeep, professional liability insurance, etc. must all be paid by the firm on a regular basis without regard to income received by the firm. Hence, once a commitment is made to undertake such litigation, it necessarily limits the ability of the firm to undertake *other* cases which would provide income to the firm on a current basis.

7. As a consequence of the factors outlined above, it is my experience that many attorneys and firms which undertake substantial class action representation maintain lines of credit with banking institutions so that the firms can continue to operate and meet their bills during the sometimes-extended periods of time during which there is no income resulting from class action litigation undertaken on a contingent basis.

8. In my experience, class actions are no more likely to result in recovery than are individual lawsuits. It is my experience that a substantial percentage of class action lawsuits are lost.

9. In my experience, it is almost never the case that the plaintiffs in a proposed class action can retain counsel on anything other than a contingent basis. Accordingly, when deciding whether to undertake the representation of a plaintiff in a proposed class action, in my experience counsel must make that decision on the assumption: (a) that the representation will require a tremendous investment of the attorney's or firm's time and money; (b) that there is a substantial risk that after such an investment of time the attorney will receive nothing; and (c) that if there is a recovery, it will probably not come for a number of years. Because of these factors, we generally do not undertake such representation unless we believe that there is a substantial probability that, if the suit is successful, our firm will receive substantially more than our usual hourly rate for time devoted to the litigation. By "substantially more than our usual hourly rate," we mean at least double that rate; otherwise the risk is too great, considering the costs of maintaining a law office. This same analysis prevails throughout the Chicago legal community.

10. Based on my experience in and familiarity with the Chicago legal community, it is my belief that a person seeking representation in a complex civil matter in this community faces very substantial difficulties in finding counsel to undertake such representation on a contingent fee basis without the possibility of receiving a substantial enhancement over normal hourly rates in the event of success.

/s/ KEVIN M. FORDE
KEVIN M. FORDE

SUBSCRIBED and SWORN
to before me this 14th day of
February , 1989.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 79 C 1243 Class Action Honorable John Nordberg
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 80 C 2151

AFFIDAVIT OF ROBERT L. GRAHAM

Robert L. Graham, being first duly sworn on oath, states as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I am a 1972 graduate of Harvard Law School and I have been admitted to the practice of law in this State since 1972. I have practiced continuously in the Chicago legal community since that time. In addition to other bar activities, I have served as the President of the Chicago Council Of Lawyers, Chairman of the Fund For Justice and a member of the Illinois Supreme Court Committee On Pattern Jury Instructions In Civil Cases.

2. I am a partner in the law firm of Jenner & Block. My practice consists almost exclusively of litigation matters,

mostly in federal court. I have litigated a large number of class action lawsuits and feel that I am quite familiar with the litigation bar in this legal community.

3. I am familiar with my firm's billing practices and the considerations that go into our firm's decision to undertake representation of clients. Except for cases taken on a *pro bono* basis, our firm does not undertake the representation of plaintiffs in any sort of litigation on a purely contingent basis. Indeed, it is my belief that in only one instance has our firm undertaken the representation of a plaintiff on a partially contingent basis, in which case our firm had the firm belief that, if successful, we would receive substantially more than our normal hourly rates for all time devoted to that case.

4. Because of the substantial risk and delay in receipt of payment involved in undertaking complex civil litigation on a contingent fee basis, our firm does not undertake such matters on that basis. While there are certain attorneys and firms in the Chicago legal community that do undertake class actions and complex civil matters on a purely contingent basis, it is my experience and belief that those attorneys and firms do so only in those situations where they believe that there is a strong probability that they will receive compensation substantially in excess of their normal hourly rates if they prevail. Based on my conversations with various members of the Chicago Bar over the years, the standard that seems to be applied by those firms undertaking substantial litigation on a purely contingent basis is whether there is a reasonable probability of receiving two to three times the attorneys' hourly rates if a recovery is made.

5. It is my belief that a plaintiff would face substantial difficulty in finding competent representation in this legal community for complex civil cases if there were not the likelihood that counsel would receive a substantial enhancement of their normal hourly rates (as discussed in the preceding paragraph) in the event they prevailed in the litigation.

/s/ ROBERT L. GRAHAM
ROBERT L. GRAHAM

SUBSCRIBED and SWORN
to before me this 14th day of
February, 1989.

Notary Public

My commission expires: 2/16/89

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE GENERAL MOTORS CORP. "THM 200" TRANSMISSION LITIGATION

ARLIE GLEN SKELTON, *et al.*, on behalf of themselves and all others similarly situated, *Plaintiffs,* *v.* GENERAL MOTORS CORPORATION, *Defendant.*	No. 79 C 1243 CLASS ACTION JUDGE JOHN NORDBERG
JOSEPHINE C. NEWTON, *et al.*, on behalf of themselves and all others similarly situated, *Plaintiffs,* *v.* GENERAL MOTORS CORPORATION, *Defendant.*	No. 80 C 2151 AND ALL CONSOLIDATED ACTIONS

ORDER[1]

Pursuant to prior Orders and rulings of the Court, the escrow agent is ordered to make payment to the following law firms the amounts of additional fees and interest indicated below. Payment is to be made to each firm on May 25, 1989, provided that by that date that firm has filed with the Court

the undertaking as indicated during the hearing on May 5, 1989. The Court finds that without an adjustment for risk the plaintiffs would have faced substantial difficulties in finding counsel in this market.

Law Firm	Additional Fees And Interest Awarded 4/25/89	Interest From 4/25/89 to 5/25/89 (at prime rate, 11.5%)	Total
Charles A. Boyle & Assoc. ..	$ 189,346.00	$ 1,516.00	$ 190,862
Corinblit and Seltzer.....	8,914.00	71.00	8,985
Abraham N. Goldman & Assoc.	190,860.00	1,528.00	192,388
Goodkind, Wechsler, Labaton & Rudoff.....	102,633.00	822.00	103,455
Frances E. Goodman	26,099.00	209.00	26,308
William J. Harte.....	109,503.00	877.00	110,380
Beverly C. Moore	219,841.00	1,761.00	221,602
Sachnoff, Weaver & Rubenstein.....	553,866.00	4,435.00	558,301
Zwerling, Schachter & Zwerling.....	7,618.00	61.00	7,679
TOTALS	$1,408,680.00	$11,280.00	$1,419,960

Dated: May 23, 1989

/s/ JOHN A. NORDBERG

JOHN A. NORDBERG
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*,
Plaintiffs, No. 79 C 1243

vs.

GENERAL MOTORS CORPORATION,
Defendant.

No. 79 C 1243
Chicago, Illinois
April 11, 1989
4:00 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN A. NORDBERG

APPEARANCES:

For the Plaintiffs:	MR. ABRAHAM N. GOLDMAN MR. LOWELL E. SACHNOFF
For the Defendant:	MR. JAMES ANDREW LANGAN MR. WILLIAM R. JENTES
ALSO PRESENT:	DR. RICHARD E. HOYT

MICHAEL P. SNYDER, RPR, CSR
Office Reporter
United States District Court
19 South Dearborn Street, Room 2128
Chicago, Illinois 60604
Telephone (312) 435-5563

MR. SACHNOFF: If Your Honor would grant a multiple that was sufficiently high to upset the folks at General Motors, then obviously they then—they couldn't appeal that, but they could take cert from that ruling, they could attempt

to apply for certiorari from that ruling, because both sides have agreed not to appeal from the size of the multiple that Your Honor grants.

Am I stating that right, Mr. Jentes? I think I am.

MR. JENTES: You are. I have that here.

MR. SACHNOFF: Good.

So Your Honor has the power to at least stop it in this court, stop it in the Court of Appeals, and then the only thing that could block a distribution would be the extraordinarily remote circumstance of the Supreme Court taking cert in a common fund case like this.

Your Honor, there has been no stay of the mandate. We would ask to have the distribution go ahead, and if they are really serious in this frolic, they ought to ask for a stay in the Supreme Court. Now, they could ask—

THE COURT: That is true. If there is no stay, we could order the final distribution.

MR. SACHNOFF: Sure, we could go ahead with the final distribution.

THE COURT: Well, all right. I want to hear from General Motors now, but let me just make two observations.

Obviously, in a sense, while I don't mean to indicate that anyone involved in this case has a wrongful attitude, the Court in a sense is now in a position of representing the class in a sense because General Motors has agreed to pay out and will pay out the full amount, and you have the conflict of interest on the question of attorneys' fees. That plus the surprise, because I think the record is clear, I feel surprised at the amount of the cost of the Analytics operation. I just—I had no idea we were running that far over, and I didn't—perhaps I should have anticipated it, but I didn't realize the amount of the cost per month where no, in effect, questions

now are being taken, and we are merely waiting for a final distribution.

So those are concerns that compelled me to ask all counsel to meet to see if there wasn't some way we could just settle the whole thing out and make a final distribution now so that we would maximize to that extent the ultimate distribution to each of the members of the class as well as whatever goodwill falls to General Motors and in effect be as efficient as possible in this by working out now an overall settlement where no further delay would be required by reason of any further court action.

Now, as I understand it, there is no delay if I find there should be a multiplier, there could continue to be a delay if I find that there should be no multiplier, and because there has been no supersedeas bond, in effect, filed, there is no stay from the seeking of cert with the United States Supreme Court.

With that, I would like to call on General Motors and Mr. Jentes to see what General Motors' position is on this.

MR. JENTES: All right. Let me say by way of background on the question of the cert. As Your Honor may or may not know, one of my partners happens to be Justice White's son, and the Justice for a long time has taken the position that he recuses himself in cases involving our firm.

Also, as you probably know, Justice White has been the author of most of these opinions relating to attorneys fees questions including the most recent, the Blanchard versus Bergeron case, and General Motors felt, and I think they are correct in their judgment, that they didn't want to have Justice White not have an opportunity to review the matter on the cert petition.

Therefore, they have decided to retain Mr. Shapiro, formerly with the Solicitor General's office, at Mayer, Brown to handle the cert petition. He has now gotten himself up to

speed. He intends to file the cert petition on the 13th of this month, and I am sure will press it very strenuously.

One possibility, Your Honor, would be on the normal schedule in the cert petition, that cert petition then would be responded to I am sure promptly by counsel for the other side, and the clear expectation would be that the Court would rule on any cert petition before it adjourned for the summer.

MICHAEL P. SNYDER, Official Reporter

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86-7763

MATTIE NORMAN, *et al.*,
Plaintiffs—Appellants

v.

THE HOUSING AUTHORITY OF THE CITY OF MONTGOMERY, *et al.*,
Defendants—Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR PLAINTIFFS—APPELLANTS

VANZETTA PENN MCPHERSON
639 Martha Street
Montgomery, Alabama 36104
(205) 262-7337

Counsel for Plaintiffs—Appellants

B. THE ATTORNEY FEES SHOULD HAVE BEEN ENHANCED.

The United States Supreme Court has recognized that enhancement of a fee award is entirely permissible in certain cases. *See Blum v. Stenson, supra, Hensley v. Eckerhart, supra.* Factors which traditionally have been considered to support enhancement of the Appellants' fee award.

First, it is beyond dispute that recovery of fees in civil rights cases is contingent upon the plaintiffs prevailing in the litigation. The legislative history accompanying the civil rights fee award statute (42 U.S.C. Section 1988) specifically refers to *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), as providing "the appropriate standards to be applied by courts awarding attorney's fees under Section 1988." *Blum v. Stenson*, 104 S.Ct. at 1551 (Brennan & Marshall, J.J., Concurring Opinion).

"Whether the fee is fixed or contingent is one of twelve enumerated *Johnson v. Georgia Highway Express* factors and "was consequently recognized by Congress as a relevant consideration in setting a reasonable fee." *Blum v. Stenson, supra* at 1551. Accordingly, the Appellants' fee in the present case should be enhanced—either by increasing the hourly rate requested or by otherwise enhancing the fee—to "reflect the risk of not prevailing."

A portion of the Appellee's counterargument below should be struck down by this Court. They presume—and the affidavits which they submitted presume—that civil rights cases are not as intellectually taxing as "securities, antitrust, or other such complex litigation". RT-57. This presumption is not uncommon, but the policy underlying 42 U.S.C. Section 1988 and the legion of cases in this Circuit which have unequivocally endorsed the soundness of that policy compel

a specific judicial denunciation of the notion that civil rights cases are not complex.[1]

Although the "quality of representation" is generally reflected in the appropriate hourly rate, it may justify an upward adjustment where the fee applicant offers "evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged" and that the success was "exceptional" *Blum v. Stenson*, 104 S.Ct. at 1549.

Appellants have demonstrated that they have handled an exceptionally complex case in an exceptionally expedient manner. While that fact is to some extent reflected in the appropriate hourly rate to be awarded Appellants' counsel, the fact that Appellants' counsel expended approximately ⅓ of the time litigating a case which involved a class approximately three times as large as that involved in *Nelson, supra,* warrants an enhancement in recognition of skill.

In addition, the anticipated monetary recovery to the class in the instant case is approximately double that which is anticipated in *Nelson*, even though the instant case was settled prior to actual trial.[2] Thus, the quality of services rendered in the present case was "superior" and the success achieved "exceptional." For this reason as well, Appellants' fee request should be enhanced.

Finally, although the "results obtained" will generally be "subsumed within other factors used to calculate a reasonable fee," and will not *normally* provide an independent basis for enhancing a fee award, see *Blum v. Stenson,* 104 S.Ct. 1549,

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[1] This notion is but an extension of the stigma attached to the status of "civil rights lawyer". It's perpetuation in the bar is the likely seed of the *Johnson* requirement that the court consider the undesirability of a case or its adherents.

[2] The same court awarded fees of $100 per hour to far less experienced Legal Services counsel in a class action which settled prior to trial. See McClain v. City of Enterprise, No. 85-T-1288-S (M.D.Ala Oct. 15, 1986).

it may be considered in "cases of exceptional success." *Blum, supra,* at 1550. In the instant case, the Montgomery Housing Authority has publicly stated that the anticipated recovery to the plaintiff class (electric utilities only) will be about $700,000.00. Based on information provided by the Housing Authority and by the Alabama Power Company, the ultimate recovery could actually be as high as $1,000,000. In addition, Appellees have stated that subsequent to the filing of the present case they suspended collection of excess gas charges from tenants at the Housing Authority (plaintiff class members) for a period of approximately [2½ years], and that the benefit to the plaintiff class (gas utility allowances) would probably approximate the recovery on the electric utility allowances. In addition, the Defendants have agreed to charge reduced gas utility allowances for an additional twenty-one months following entry of the Consent Order and Judgment.

Thus, a conservative estimate of the total benefit achieved for plaintiff class members is between 1.5 and 2 million dollars. Obviously, the results obtained were "exceptional"; and enhancement of Plaintiffs' fee award is entirely justified on that basis as well. (A modest contingent fee award of only 30% would equate a $400,000—600,000 fee award in the instant case).

C. There Have Been Comparable Fee Awards In Similar Cases

A predominant factor to be considered in setting fee awards under *Johnson v. Georgia Highway Express* is "awards in similar cases." 488 F.2d at 719. One of the contemporaneous fee awards in similar cases is that awarded in *Nelson v. Greater Gadsden Housing Authority, supra.* There, two legal services attorneys and an associated private attorney spent approximately 1,200 hours litigating a case comparable to the instant case, but involving approximately ⅓ the number of public housing units. The fee award in the case was enhanced by a factor of 1.5. In addition, the Court awarded

$3,101.40 as reasonable fees and expenses incurred in the representation of counsel for the plaintiff class at the hearing on attorney's fees. The total fee awarded was $209,518.45.

There have been several other cases in the Middle District of Alabama in which the lodestar calculation yielded a much higher hourly rate and in which the court's consideration of the *Johnson* factors enhanced the fee under circumstances similar to those that obtain here. That court has awarded fees in the range of $100 per hour in the following civil rights cases: *York v. Alabama State Bd. of Education, supra; Birl v. Wallis.* No. 83-T-809-N (M.D. Ala. July 24, 1986); *Zakrzewski v. Alabama State Council,* No. 85-T-512-N (M.D. Ala. April 28, 1986); and *McClain v. Alabama State Council,* No. 85-T-512-N (M.D. Ala.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
Defendant.

No. 79 C 1243
Chicago, Illinois
April 25, 1989
3:30 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN A. NORDBERG

APPEARANCES:

For the Plaintiffs: MR. ABRAHAM N. GOLDMAN
MR. LOWELL E. SACHNOFF

For the Defendant: MR. JAMES ANDREW LANGAN
MR. WILLIAM R. JENTES
MS. ANN M. HAMILTON

MR. SACHNOFF: I can say for the record now that there was a great deal of skepticism as to whether it was a wise thing to do, because they thought there would be an affirmance that would be carved in stone up in the Seventh Circuit. Our fees are, I feel, what fees ought to be on appeal.

I want to state for the record that I am going to consult with my colleagues upon whom I have really bestowed a gift here, and I will see whether or not I can persuade them in the interest of full justice to compensate us for the costs and the fees that we incurred in connection with the appeal. I

hope they will do that, but I am not certain, and if they don't, I will supply the Court with authorities that support the proposition that class counsel are entitled to payment of fees in a case such as this where it is necessary to take an appeal.

Those are the only two issues, Your Honor, that come to mind.

THE COURT: All right, but that wouldn't delay the final distribution.

MR. SACHNOFF: No, not at all.

THE COURT: Mr. Jentes.

MR. JENTES: We are obviously disappointed in Your Honor's ruling. I think it is an unfortunate precedent, but I am not going to reargue the issue.

THE COURT: Well, it is not going to be published, and, as far as I am concerned, it ends with this case. This is a unique case.

MR. JENTES: I would certainly welcome Mr. Sachnoff's offer to provide some kind of a letter of credit or bond or whatever on behalf of the plaintiffs' counsel so that if the Supreme Court takes this matter on cert and reverses the Seventh Circuit, as I would hope and indeed somewhat expect them to do, that we would be able to figure out a way to insure that the attorneys fees that are now being withheld would ultimately get to the class. So if that can be worked out mechanically, we would welcome that.

Secondly, with regard to the matter of any further application for fees, I can only say we will respond to that whenever that is put forward.

Finally, I think that the procedural status of the case now in terms of further appeals and in terms of the certiorari is something that we will have to consult with the Mayer, Brown firm on, and I just don't know now whether we may have any other suggestions as to how the actual ordering here should be done so that we are preserving adequately the record so that it can be considered by the Supreme Court. So I will have to get back to Your Honor, if I may, if we have any suggestions on that.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendant.

Civil Action
No. 79 C 1243

JOSEPHINE C. NEWTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendant.

No. 80 C 2151

And Related.

Before the HON. JOHN A. NORDBERG, Judge, on Tuesday, July 8, 1986, at the hour of 10:15 o'clock, a.m.

PRESENT:

MR. SACHNOFF,
MR. BOYLE,
MR. HARTE,
MR. MOORE,
MR. PLASSE,
MR. JENTES,
MR. JOHNSON
(And other parties not identifying themselves for the record.)

MR. JENTES: I think that that language is eminently applicable to the settlement that has been reached here, and, on that basis, I hope that your Honor will preliminarily approve the materials that have been submitted.

In that connection, Mr. Sachnoff handed to you the order for consolidation and the redefinition of the class, et cetera.

There is a second order that also has some changes in it, necessitated by the fact that we do not have the Atard and Morgan cases here.

I gather, Mr. Sachnoff, that you've just handed that to the —

MR. SACHNOFF: I have.

THE COURT: Okay.

MR. JENTES: All right. Fine.

Those two orders, as modified, your Honor, I think are in an appropriate form now for entry by your Honor. I think there are a couple of dates that need to be filled in on the forms—

THE COURT: Well, all right, but before we get to that let me just indicate, and I was planning to cover that language but— and that's in Section 30.44 of the Manual for Complex Litigation Second, and I do think that that sums up what the Court should consider at this hearing, which is a first stage of the ultimate Fairness Hearing that would be required to settle this case.

It seems to me that the other thing that has not really been fully covered by all of the parties orally, although it has been alluded to in the written material, and certainly anybody who has worked on this case is familiar with all of the problems that are involved in this litigation, and without taking sides substantively in any way, I think that it is clear over the course of this litigation and is indicated in other similar type of litigation, the severe strains and the great

uncertainty that results from the sheer numbers and the sheer complexity of fact finding that could be required in a case of this nature.

Now, I know that plaintiffs have a statistical theory that they feel could have supported the case but—and that may ultimately have proven to be correct, but I don't think anybody can look at this entire case without realizing that it not only would be extremely expensive to try; there would be an extremely expensive appeal that would be taken, but also there would be a great deal of uncertainty and I think an extremely long period of time before this matter was finally resolved, and I think that all of these are factors also that have to be considered in determining whether this is a fair and proper settlement of this action.

Now, the request for the modification of the class is a matter that I have also carefully considered and the settlement class, the revised class, in a way, is broader than what was certified; broader, perhaps, than what the law would require, but, in a way, it is narrower, too, and I have considered that as well.

In any event, one final thing, which is not really as easy for counsel to say themselves as it is for me to say because it is the truth, the Court has been blessed throughout this case with the fact that we have outstanding lawyers representing the respective interests involved here and they have worked very conscientiously on their respective clients' behalf and that has been a real help to the Court and that certainly is a factor that the Court can also take into account in determining whether, ultimately, the settlement reached is a proper and fair one.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	Civil Action No. 79 C 1243
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 80 C 2151

And Related.

Before the HON. JOHN A. NORDBERG, Judge, on Thursday, October 30, 1986, at the hour of 2:30 o'clock, p.m.

PRESENT:

MR. SACHNOFF,
MR. BOYLE,
MR. SCHUMACHER,
MR. MOORE,
MR. SCHACHTER,
MR. HARTE,
MR. GOLDMAN,

MR. SUCHAROW
on behalf of respective plaintiffs;
MR. JENTES,
MR. JOHNSON,
MR. LANGAN,
MR. LINDEMAN,
on behalf of defendant.

THE COURT: Now, I think that I did cover—we did deal with the question about the loss of trade-in value, as to which there would be, and I think the expression was "the insurmountable problems of proof," and I don't know that anything is "insurmountable" but it would be extremely difficult and I'm not sure, in the long run, what that would do to the ability of there to be an ultimately successful judgment on behalf of any of the plaintiffs. But, in any event, I do believe that there has been an adequate explanation for the reason that one—one of the reasons, anyway—why it was not attempted to be included and— well, I think it probably was attempted to be included but the reason it was not included in the settlement agreement is that it is a settlement agreement; it was negotiated. Certain matters could be included, ultimately, by agreement; other matters could not. That was a matter that was not included and I don't find that that makes the settlement agreement unfair.

I might just say that there is difficulty of proof in this case. I know how strongly the plaintiffs feel about the case, and I know how strongly General Motors feels to the contrary that it should not be found liable on this situation, and I don't say that either side is not acting in complete good faith in having that difference in views.

One of the reasons for it is, and I won't go into the details of it but, unfortunately, no company on earth can make perfect products, particularly when you get into more complex areas such as are involved in making automobiles; there is

always a certain number of failures that will occur in mass production, and so, too, is this true of transmissions.

So, the real issue in the case is whether the failure rate of the THM-200 transmission is high enough to indicate that there is should be liability on the part of General Motors. That's an oversimplification of the issues but having some knowledge now of the general areas in which the proof would come in, I can speak, I think, with some authority to indicate that this would be a difficult case for plaintiffs to try and it would be difficult to have great assurance as to what the ultimate verdict of a jury might be in this case.

So, taking, then, all of these various matters into account, the Court does find, pursuant to Rule 23(e), now, that the proposed settlement of this case and the settlement agreement that is involved, is fair, reasonable and adequate, and the Court so finds, and, therefore, the Court does approve the proposed order that has previously been presented to the Court, and I have now a revised version of that, a portion of the order being—well, I will read the first portion of the order just so that those of you who are present will have a sense of it. It is a long order and I won't read the whole thing but, certainly, copies will be made available to anybody who wishes to have a copy of that order.